

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Fitchburg Gas and Electric Light Company

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) D.T.E. 02-24/25  
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**APPEAL BY THE ATTORNEY GENERAL OF THE HEARING OFFICER'S  
RULINGS DENYING THE ATTORNEY GENERAL'S MOTION TO STRIKE  
PORTIONS OF COMPANY'S RESPONSE TO AG RECORD REQUEST 7 AND THE  
ATTORNEY GENERAL'S MOTION TO STRIKE COMPANY TESTIMONY  
RELATING TO THE 1998 HAY STUDY**

The Attorney General, pursuant to 220 C.M.R. § 106(6)(d)(3), hereby appeals the presiding Hearing Officer's denial of two Attorney General motions made during hearings on August 23, 2002: (1) Motion to strike portions of Fitchburg Gas and Electric's ("the Company") response to AG Record Request 7; and (2) Motion to strike portions of the Company's testimony, responses to information requests and record requests relating to a 1998 Hay Group Study. As grounds for this appeal, the Attorney General asserts that the Hearing Officer rulings constitute an abuse of discretion because the Company's record request response includes new and irrelevant material produced at a very late date, which effectively deprives the Attorney General of his ability to cross examine witnesses on their testimony. Furthermore, the Company's testimony regarding wage and benefit compensation expenses using the 1998 Hay Group Study requires the Department to rely on information not contained in the record.

**I. BACKGROUND**

On May 17, 2002, the Company filed with the Department two separate rate cases for its gas and electric divisions. As part of its case, the Company submitted the testimony of Mr. Mark Collin regarding proposed increases in its payroll operations and maintenance expenses. Exh. FGE MHC-1, pp. 37-40 (Electric) and Exh. FGE MHC-1, pp. 34-37 (Gas).<sup>1</sup> The Company's proposed payroll increases are based in part on a January 19, 1998 Hay Group wage and benefit study ("1998 Study") commissioned by the Company in 1997. Tr. 11, p. 1344-1345. The 1998 Study itself was based on an analysis of survey responses sent to the Hay Group in 1997 from companies nationwide, which were distilled into an off-the-rack set of reports ("1997 Reports") which are available commercially. Tr. 11, p. 1369.

Neither the 1997 survey responses nor the 1997 Reports have been filed or made

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<sup>1</sup> The corresponding Bates-stamp numbered pages are 040-043 (Electric) and 037-040 (Gas).

available to the parties and the Department in this proceeding, although the Attorney General has requested that copies be produced. *See* AG-7-11, 7-12 (Electric); AG-5-11, 5-12 (Gas); Tr. 11, p. 1358; RR-AG-7. The Company asserts that the 1997 Reports are no longer available and were under copyright proscriptions. *Id.*; Tr. 11, p. 1359. The Company, in responding to AG Record Request 7, referred to additional copyrighted surveys and reports published by Watson Wyatt, Towers Perrin, Compdata, the American Gas Association, and the Edison Electric Institute. According to the Company, it uses surveys published by these companies to “benchmark” the 1998 Hay Study recommendations and discards all but the most current volumes of the surveys. RR-AG-7.

On August 23, 2002, the Attorney General asked that all but the first two sentences be struck from the Company’s response to AG Record Request 7 on the grounds that the remaining information was irrelevant, did not respond to the question asked, attempts to include information that cannot be filed as part of the record, and was provided in an untimely manner. Tr. 11, p. 1367. The presiding Hearing Officer denied the motion without giving any reasons for the denial and gave the Attorney General one business day to file an appeal to the full Commission. Tr. 11, p. 1368.

The Attorney General later asked the Department to strike those portions of Mr. Collin’s testimony that relies on the 1998 Hay Study, specifically pages 37-40 (electric) and 34-37 (gas), information request responses AG-7-11 and 7-12 (electric), and AG-5-13 and 5-14 (gas).<sup>2</sup> Tr. 11, p. 1370. The stated basis for the motion was that the 1998 Hay Study relied upon the 1997 Reports which are unavailable and unreproducible, thereby failing to meet the Department’s discovery standard and failing to allow parties access to the clearly relevant information. Tr. 11, p. 1372. The Hearing Officer denied the second motion without explanation. Tr. 11, p. 1389-1390.

## **II. STANDARD OF REVIEW**

Parties have a right to cross examine witnesses who testify. G.L. c. 30A, § 11(3). All evidence upon which the Department relies for its conclusions must be offered and filed as part of the record. G.L. c. 30A, § 11(4). Relevant intellectual property, procured under a third-party licensing agreement which prevents discovery, must be produced if: (1) The information is an essential component of the Company’s testimony; (2) The information is highly relevant to the proceeding; and (3) The Company’s substitute method of providing the information or making certain information available to the parties does not satisfy the requirement that the relevant information be produced. (*Verizon’s Unbundled Network Elements*, D.T.E. 01-20 (UNE) Order (August 31, 2001), pp. 13-19 (“UNE Order”). Absent its production the information must be struck from the record and cannot be used to support the Department’s conclusions. *Id.*; G.L. c. 30A, § 11(4).

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<sup>2</sup> The correct information request responses should be AG-5-11 and AG-5-12 (gas), not 5-13 and 5-14 (gas), and the Attorney General asks that his motion be modified to reflect this correction.

The Department's procedural rules provide the presiding officer with the discretion to make all decisions regarding the admission or exclusion of evidence or any other procedural matters which may arise in the course of the proceeding. 220 C.M.R. § 1.06(6)(a); *see also Western Massachusetts Electric Company*, D.T.E. 97-120-3, p. 6 (1998). Discretion is not unlimited. Where a presiding officer abuses his or her discretion, the Department may overturn a ruling or decision of the presiding officer.

### **III. ARGUMENT**

#### **A. The Company's Record Request Response Was Untimely and Improper**

The Hearing Officer erred in denying the Attorney General's request to delete all but the first two sentences of RR-AG-7. The remainder of the response referred to documents which have not been filed with the Department as part of the record and were not shown to the Attorney General until August 20, 2002, well over two months after the Company received four information requests that asked for the supporting surveys. *See* AG-5-11 and 5-12 (gas) and 7-11 and 7-12 (electric). By referencing new material late in the course of the Department's investigation, the Attorney General has been deprived of his ability to cross examine Mr. Collin effectively on his testimony. The purpose of discovery is to permit parties to gain access to all relevant information in a timely and efficient manner. 220 CMR § 1.06(6)(c)(2).<sup>3</sup> The Company has frustrated that purpose by intentionally delaying the revealing of the source of its wage and benefit information. The Company has prevented the parties from a thorough examination of the methodology used, and conclusions reached, to support the payroll O&M increase. The Hearing Officer abused his discretion in not granting the Attorney General's motion to strike all but the first two sentences of the Company's response to RR-AG-7.

#### **B. All References to the 1998 Hay Study Must Be Deleted**

Massachusetts law affords parties to adjudicatory proceedings before administrative agencies "reasonable opportunity to prepare and present evidence and argument." G.L.c. 30A, § 11(1). In this matter, the Company insists on using the 1998 Hay Study but refuses to allow the Department and parties access to the underlying documents, the 1997 Reports and surveys, that form the basis of the 1998 Study. The relevance of the 1997 Reports is clear and undisputed. The Company has failed to produce the underlying 1997 Reports as requested, and the parties are denied an opportunity to examine or challenge the 1998 Study effectively unless they are permitted to review the 1997 Reports. The Company's offering of other years' reports and other companies' surveys is an inadequate substitute for the underlying data in the missing 1997

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<sup>3</sup> Moreover, the volumes of material published annually by Watson Wyatt, Towers Perrin, Compdata, AGA, and EEI have not been produced in accordance with the nondisclosure agreement executed by the Company and the Attorney General, which requires the Company to send copies of the allegedly proprietary information to the Attorney General's office, not merely to allow the Attorney General to view the data.

Reports. Under Departmental precedent, the Company has not met its obligation to support its assertions with information that can be made part of the record. *UNE Order*, Id. The Hearing Officer abused his discretion by not granting the Attorney General's motion to strike.

#### **IV. Conclusion**

The Hearing Officer's ruling constitutes an abuse of discretion. The Attorney General appeals to the Commission to overturn those rulings and require the Company to: (1) strike all but the first two sentences of RR-AG-7; and (2) provide the Attorney General with a copy (not merely a viewing) of the 1997 Reports or, in the alternative, strike the aforementioned portions of the Company's testimony.

Very truly yours,

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